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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 854

R. H. ROBINSON, LOWRANCE BROTHERS & COMPANY, INC., a corporation, LYNN W. MORRILL, S. CARL MILLER, W. H. AMOS, and W. G. PARKER, intervenors below, suing on behalf of themselves and other cotton producers similarly situated (including JAMES WYNN THOMPSON, JR., A. W. FISHER, D. S. HOPSON, and ALLIE H. WARD, Administratrix, the original plaintiffs below), *Petitioners*,

v.

ERNEST L. DEAL, Individually and as Manager of the National Surplus Cotton Tax Exemption Certificate Pool, 1935, HENRY A. WALLACE, Individually and as Secretary of Agriculture of the United States, W. A. JULIAN, Individually and as Treasurer of the United States, JOHN B. PAYNE, Individually and as Comptroller of the Agricultural Adjustment Administration, and CHESTER C. DAVIS, Individually and as Administrator of the Agricultural Adjustment Administration, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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January, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

The Court of Claims overruled an allegation to the contrary and sustained a demurrer because—

> **Not one penny of the amount paid into the [Bankhead Cotton Act] pool went into the general fund of the Treasury of the United States.**[1]

The Court below ignored the admissions of respondents to the contrary and held—

> * * * **that all moneys received in connection with the operation of the [same] pool had gone into the possession of and under the control of the United States * * * and had been duly covered into the Treasury of the United States * * * (R. 994).**

Only this Court can now resolve the conflict.

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[1] *Crain* v. *United States*, 96 C. Cls. 443, 454, 44 F. Supp. 321, 325-326, cert. den. 317 U. S. 667.

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v.

ERNEST L. DEAL, Individually and as Manager of the National Surplus Cotton Tax Exemption Certificate Pool, 1935, HENRY A. WALLACE, Individually and as Secretary of Agriculture of the United States, W. A. JULIAN, Individually and as Treasurer of the United States, JOHN B. PAYNE, Individually and as Comptroller of the Agricultural Adjustment Administration, and CHESTER C. DAVIS, Individually and as Administrator of the Agricultural Adjustment Administration, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners, R. H. Robinson, Lowrance Brothers & Company, Inc., a corporation, Lynn W. Morrill, S. Carl Miller, W. H. Amos, and W. G. Parker, intervenors below, suing on behalf of themselves and other cotton producers similarly situated (including James Wynn Thompson, Jr.,

A. W. Fisher, D. S. Hopson, and Allie H. Ward, Administratrix, the original plaintiffs below), pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled cause on October 23, 1944.

OPINIONS BELOW.

The first opinion of the District Court, dismissing this proceeding on respondents' motion, is unreported (R. 181-182).[1] The Court of Appeals for the District of Columbia thereafter reversed the District Court in an opinion filed June 28, 1937 (Appendix, *infra,* pp. 17-41),[2] and reported at 67 App. D. C. 327, 92 F. 2d 478. Four justices concurred in the reversal and one justice dissented.

Following a trial on its merits before the District Court, the case was again dismissed in an opinion filed March 24, 1943 (R. 965-970), and reported at 49 F. Supp. 366. Upon a second review the Court of Appeals affirmed the holding of the trial court in a *per curiam* opinion handed down October 23, 1944 (R. 992-995), and reported at 145 F. 2d 382.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on October 23, 1944 (R. 996). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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[1] References preceded by "R" refer to pages of the Joint Appendix filed in the Court of Appeals and thereafter certified to this Court.

[2] This opinion is not in the record and is therefore printed as an appendix to this petition. References to this opinion hereinafter will be preceded by "App."

QUESTIONS PRESENTED.

1. Do the courts of the United States have jurisdiction to decide between private litigants the title to an account in the United States Treasury when the account is made up of contributed trust funds with respect to which the United States makes no claim?

2. When contributed funds are deposited in trust in the United States Treasury pursuant to § 20 of the Permanent Appropriations Repeal Act and the express trust fails, do the funds remain appropriated so as to permit them to be returned to the contributors?

3. When respondents by their verified statements in this and other proceedings have prevented a recovery from the United States of the trust fund here involved, are they estopped from denying their previous statements regarding their possession of the fund?

4. When no question of judicial notice is involved and proper objections are made, may a trial court admit evidence and make findings of fact contrary to the facts alleged and admitted in the pleadings?

5. May trustees with notice that the trust has failed disburse the trust res to the original beneficiaries and thereby avoid personal liability in an action brought against them by the contributors for the return of the trust res?

STATUTES INVOLVED.

The statutes involved are the so-called Bankhead Cotton Act and §20 of the Permanent Appropriation Repeal Act, 1934. The Bankhead Cotton Act (Act of April 21, 1934, c. 157, 48 Stat. 598, amended 48 Stat. 1184, 49 Stat. 776, repealed 49 Stat. 1106) and its amendments are printed in the record (R. 51-62). The pertinent part of § 20 of the Permanent Appropriation Repeal Act, 1934 (Act of June 26, 1934, c. 756, 48 Stat. 1224, 31 U. S. C. A. § 725s) is as follows:

Sec. 20. (a) The funds appearing on the books of the Government and listed in subsections (b) and (c) of this section shall be classified on the books of the Treasury as trust funds. All moneys accruing to these funds are hereby appropriated, and shall be disbursed in compliance with the terms of the trust. Hereafter moneys received by the Government as trustee analogous to the funds named in subsections (b) and (c) of this section, not otherwise herein provided for, except moneys received by the Comptroller of the Currency or the Federal Deposit Insurance Corporation, shall likewise be deposited into the Treasury as trust funds with appropriate title, and all amounts credited to such trust-fund accounts are hereby appropriated and shall be disbursed in compliance with the terms of the trust: * * *

STATEMENT OF THE CASE.

In 1934 Congress enacted the Bankhead Cotton Act (R. 51-60) which levied a tax upon the ginning of cotton and provided for amounts of cotton to be produced tax-free in the ensuing years. This tax-free cotton was to be divided among the various cotton producers, and this was done by the issuance to them of certificates exempting from the tax a percentage of their normal production (R. 966, 974).

The tax was fifty per cent of the value of the cotton, but not less than five cents per pound, and applied to all cotton produced by a farmer in excess of his allotment (R. 52-53). The tax was to be collected by the ginner when the cotton was ginned (R. 405), unless, of course, the producer presented tax-exemption certificates covering his cotton (R. 56). If the tax were not paid or certificates surrendered, the ginner could not issue a "bale tag" for the cotton (R. 379, 828, 871), and in the absence of such a tag the owner could not sell his cotton or ship it outside of the county without subjecting himself to severe penalties (R. 57-58).

Under the regulations issued pursuant to the Act exemption certificates were transferrable in general at four cents a pound (R. 828, 875-876) while the tax itself exceeded five

cents a pound (R. 52). The certificates were transferable through the local county agricultural office or through a national pool administered by respondents (R. 966).

Under the procedure set up farmers who did not produce enough cotton to consume their allotted certificates could surrender their certificates *in trust* to respondent Deal, the manager of the national pool. He was to sell the certificates and account to these "under producers." (R. 966-967.)

The national pool had three sets of books or accounts (R. 974-975) because of changes in the price of cotton and in the transfer price of the exemption certificates (R. 565-566, 828-830, 898). Respondent Deal received only one appointment (R. 728, 976), the trust agreements were admittedly "similar in all material respects" (R. 126, 200, 747, 828, 874), and certificates unsold on the first set of books could be transferred to the second or third set (R. 147-148, 744-745). Furthermore, 1934 certificates could be surrendered in connection with any of the three accounts and certificates sold from any account could be used to market cotton produced in any year (R. 148).

Petitioners and the original plaintiffs are cotton producers located in Alabama, Mississippi, Arkansas, or Arizona. During one or both of the crop years 1934-35 and 1935-36 they were all engaged in the production of cotton on their respective farms and were members of the class here involved which had produced cotton in excess of the amount for which they were severally allotted tax exemption certificates. (R. 2, 193, 383, 403, 407.)

Respondents are individuals who were employed by the United States during the aforesaid crop years, and they are sued in their individual capacities (R. 3, 965, 972; App. 22). While the Bankhead Cotton Act was in effect, respondent Wallace was Secretary of Agriculture, and as such, promulgated the regulations and controlled the funds sued for here (R. 17, 972); respondents Davis and Payne were Administrator and Comptroller, respectively, of the

Agricultural Adjustment Administration; respondent Deal was, and it is believed that he still is, manager of the national pool; and respondent Julian was, and still is, Treasurer of the United States (R. 972-973, 976).

During the crop years mentioned above petitioners and the original plaintiffs chose to market the cotton which they had produced in excess of their respective allotments by purchasing the cheaper exemption certificates instead of paying the fifty per cent tax (R. 967). They secured their additional certificates from the national pool operated by respondents and paid for these additional certificates by checks made payable to "E. L. Deal, Certificate Pool Manager" (R. 356, 373, 412, 417) or "Certificate Pool Manager" (R. 244, 519, 739, 742, 833). The checks were drawn this way in accordance with instructions (R. 43, 148, 412, 975). Upon receipt of these checks the pool representatives in the various county offices (called Assistants in Cotton Adjustment; R. 565-566, 828-830, 896) delivered the purchased certificates (R. 977-981).

The checks used to purchase the certificates here involved were sent by these pool representatives to Washington, D. C., and were received by Deal (R. 129, 741, 743, 828, 877). The checks were then endorsed "Pay to the order of The Treasurer of the United States, [signed] E. L. Deal, Certificate Pool Manager", and were thereafter transmitted through Payne to Julian and deposited in the Treasury of the United States as "contributed trust funds" pursuant to § 20 of the Permanent Appropriation Repeal Act, 1934 (R. 244, 603-605, 612, 618, 626-627, 646-647, 748, 827-828, 833, 877, 977-978).

On January 6, 1936, the Agricultural Adjustment Act of 1933 was held to be unconstitutional, *United States* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312, and that decision also determined the invalidity of the Bankhead Cotton Act (R. 989; App. 21). Thereafter, the original plaintiffs below on January 25, 1936, instituted this proceeding as a class action to recover the amounts they had paid to respondents for exemption certificates (R. 2-14). The suit sought to have a receiver appointed to hold the moneys paid to

respondents and a preliminary injunction to restrain disposition of the trust fund, and prayed that upon a final hearing they and those for whom the suit is prosecuted be declared to be the owners of the fund and entitled to receive the amounts which they have severally paid into the fund (R. 13-14, 968; App. 20).

At the time this suit was commenced and respondents were served, over $5,000,000 of pool funds (R. 497, 501-502) remained in the Treasury of the United States "under a special symbol number" as required by the trust agreements (R. 65). An additional $799,000 (including $784.00 paid by petitioner S. Carl Miller) was received by respondents and placed in the Treasury several months later (R. 567, 981, 984-985).

Following the issuance and service of a rule to show cause (R. 116), the respondents filed their verified return to the rule which admitted, for the most part, the allegations of fact in the complaint (R. 117-134).

Respondents' admission covering the relationship of the United States to these funds was in part as follows:

> * * * defendants admit that the amounts paid into said Pool through defendant Deal as trustee of said fund were not paid to any collector of internal revenue and were not paid to the United States. Defendants admit that plaintiffs have no remedy for, or right to, the return to the plaintiffs by the United States or by any collector of internal revenue of any part of said payments, and allege that said payments have no connection with and form no basis for any claim against the United States or any agent of the United States in his capacity as such agent, but that said payments were in substance *payments between private parties in a matter involving the transfer of property in which the United States Government had and has no proprietary interest* (R. 131; App. 21). (Emphasis by respondents.[3]

[3] A similar admission was made by respondents in their brief on the first appeal (App. 22); in their verified answer to plaintiffs' complaint (R. 203); in the sworn statement submitted to the Court of Claims (R. 874, 877); and in their representations to Congress (R. 886, 930; not received in evidence, R. 565-566, 828-830).

A few weeks later respondents filed their motion to dismiss (R. 180-181) which the District Court sustained (R. 181-182, 188).

The original plaintiffs noted an appeal in open court (R. 188) and respondents thereafter advised counsel for plaintiffs by letter of their intention to disburse the trust funds (R. 838-840.)[4] Plaintiffs replied to respondent Deal in part as follows:

> * * * we do not wish you to proceed to distribute the funds involved under any misapprehension as to the intention of plaintiffs to hold you and other defendants personally responsible in the event of reversal of the judgment of the lower court. (R. 836-837.)

A copy of this letter was also sent to respondent Julian (R. 835) and its receipt was acknowledged for him (R. 837).

Respondents thereafter distributed some $5,700,000 to the "under producers" (App. 20, footnote 2). A balance of approximately $116,000 now remains in the pool accounts (R. 985-987).

The Court of Appeals on its first consideration of the case reversed the District Court. *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. 2d 478 (App. 17-41). The majority opinion, four justices concurring, held that the suit was a proper class action (App. 24-25), that it was against the respondents individually (App. 22), that a court of equity had jurisdiction (App. 24), that plaintiffs had paid money to respondents under duress and coercion (App. 29), and that such duress and coercion was attributable to respondents (App. 30). One justice dissented (App. 31-41).

No certiorari being applied for, the case was returned to the District Court and respondents filed their verified answer, again admitting in general the facts alleged in the complaint (R. 193-206).

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[4] This correspondence was received in evidence subject to a ruling as plaintiff's exhibit 18. See the original certified record pp. 544-547, 986.

At a pretrial hearing sometime later respondents sought leave to amend their answer insofar as it admitted the payments alleged to have been made by plaintiffs (R. 213). Counsel for plaintiff consented and agreed to the taking of depositions in Mississippi (R. 364-365).

Prior to the taking of these depositions, a Mr. Jackson and two or three other investigators from the Department of Agriculture (R. 361) went to Greenville, Mississippi, and began investigating the operations of plaintiff Fisher (R. 360, 365-367, 373-374). Mr. Fisher first learned of this activity from some of his tenants (R. 359-360). While the payments made by plaintiffs were for the crop year 1935-36, those investigators said they had authority to, and would, tie up the distribution of all government funds for the crop year *1941*—not only those due plaintiffs, but also those due *every other farmer in the county* (R. 360-361, 373-374) unless this proceeding was withdrawn (R. 361, 371). Thus, the previously militant plaintiffs (R. 367, 369) were so threatened with financial (R. 360-362, 371) and criminal (R. 366, 371) complications as to be (in the words of their attorney) "utterly threatened out of the law suit" (R. 374)—a fact which the Court of Appeals voluntarily censured (R. 993, footnote 2).

Petitioners, who had been following the case (R. 369), immediately filed and served a motion to intervene (R. 214-215, 411). After this had been done an unsuccessful attempt was made the same day (after the Court's regular hours) to have the action dismissed on plaintiffs' motion by a justice in chambers (R. 217).

Following a subsequent hearing in open court petitioners were permitted to intervene (one without objection; R. 220-221), and the motion of the plaintiffs to dismiss was denied (R. 229-230).

Further prosecution of the case was then left to petitioners (R. 969, 972) who filed complaints (R. 222-227, 231-236) incorporating by reference practically the identical allegations as those contained in plaintiffs' complaint (R. 994).

After a trial on the merits of the case the District Court again dismissed the complaints (R. 990) which action the Court of Appeals affirmed on a second review (R. 996).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred as follows:

1. In failing to follow the law of the case as previously determined by it to the effect that this is a proper action against respondents individually and one in which the United States has no interest.

2. In denying a judgment for petitioners on the improvised ground that the fund involved was not available for payment to plaintiffs and to petitioners after having previously held that the original plaintiffs were entitled to recover from defendants personally.

3. In holding (even if the case should be decided on the present availability of the fund involved) that the Permanent Appropriation Repeal Act did not appropriate trust funds on deposit in the United States Treasury for payment to the contributors to the trust when the express trust fails.

4. In holding that it was without power to compel a restoration of the trust res.

5. In failing to find the balances in the pool accounts on January 31, 1936, and the amounts paid into the pool accounts after January 31, 1936.

6. In failing to receive in evidence as admissions against interest statements made by respondents in a Hearing Before a Senate Subcommittee.

7. In finding and holding that the payments made by petitioners and the other members of the class were commingled with the moneys of the United States.

8. In failing to award counsel fees to attorneys for petitioners.

9. In failing to give judgment for the petitioners, for the original plaintiffs, and for the other members of the class as prayed for in the respective complaints.

REASONS FOR GRANTING THE WRIT.

I

The Court should grant the writ to settle a direct conflict between the Court of Claims and the Court of Appeals concerning title to the trust fund here involved. In a contemporaneous case the Court of Claims overruled an allegation to the contrary and took judicial notice of the fact that the United States has no interest in the trust fund here involved. *Crain* v. *United States*, 96 C. Cls. 443, 454, 44 F. Supp. 321, 326, cert. den. 317 U. S. 667. The same holding was reached by the Court of Claims after a trial on the merits in *Brackin* v. *United States*, 96 C. Cls. 457, 468, 44 F. Supp. 327, cert. den. 317 U. S. 669.[5] Congress undoubtedly also concluded that the United States had no interest in these trust funds because it failed to appropriate funds to reimburse the class now before the Court (R. 995, footnote 3)[6] after it had previously reimbursed those cotton producers who paid the tax in cash to the United States. Second Deficiency Appropriation Act, Fiscal Year 1938 (Act of June 25, 1938, c. 681, 52 Stat. 1114, 1150-1151).

The Court below, however, after having once held that "here the government has no proprietary or possessory

[5] The *Brackin* case was presented to the Court of Claims on a Congressional reference pursuant to § 151 of the Judicial Code, 28 U. S. C. A. § 257, and that Court in denying direct liability on the part of the United States invited the attention of Congress to the instant proceeding. *Ibid.* at 44 F. Supp. 333.

[6] Cf. plaintiff's exhibit 91 (R. 883, 886) which was not received in evidence (R. 565-566, 828-830). The bill S. 963 never became law.

rights in the fund" (App. 24) has now held that the same fund is under the control of the United States and cannot be touched until "the United States shall submit to be sued to determine its disposition" (R. 994). The first holding of the Court of Appeals was based in part on certain admissions and the second (and contrary) holding was made despite the fact that exactly the same *admissions* were before the Court on the two appeals (Cf. R. 127, 131, and R. 201-202, 203). Obviously, the second holding by the Court below failed to follow "the law of the case". *Claiborne-Reno Co.* v. *E. I. DuPont DeNemours & Co.*, 8 Cir., 77 F. 2d 565; *H. P. Coffee Co.* v. *Reid, Murdoch & Co.*, 8 Cir., 60 F. 2d 387; *Anchor Stove & Range Co.* v. *Rymer*, 6 Cir., 97 F. 2d 689, cert. den. 305 U. S. 653. Cf. *Munro* v. *Post*, 2 Cir., 102 F. 2d 686, 688.

The last opinion of the Court of Appeals spotlights the Court's inconsistency. Thus, the Court states that its first opinion (App. 17-41) was based on "the pleadings *and admissions*" (R. 993) but that it could no longer sustain "the presumption which" it had "indulged on the previous appeal" (R. 994; italics supplied).

If the facts were admitted, however, there could be no presumption.

Furthermore, the facts as admitted by the pleadings were conclusive against respondents. *Nichols* v. *Bealmer*, 36 App. D. C. 352.

II

The Court should grant the writ to set at rest the status of numerous contributed trust funds which are deposited in the United States Treasury pursuant to § 20 of the Permanent Appropriations Repeal Act, *supra*, pp. 3-4. That section, besides authorizing such trust funds to be deposited in the Treasury, provides that—

> * * * all amounts credited to such trust-fund accounts are hereby appropriated and shall be disbursed in compliance with the terms of the trust * * *.

The Court of Appeals appears to have accepted as a fact the trial court's asserted finding (R. 988) that—

> * * * there is no Congressional authority for withdrawal of money from the Treasury under the pool appropriation accounts for payment to plaintiffs and intervenors * * *. (R. 994.)

This, it is submitted, is purely a question of law involving only the interpretation of the statutory language quoted above and is a question which this Court should pass upon in order to fix the rights of individuals to money in their government's Treasury to which the government makes no claim.

The effect of the holding below is to interpret § 20 of the Permanent Appropriations Repeal Act to mean that all such trust funds are appropriated *only* for the purposes of the express trust and that no appropriation exists where, as here, the express trust fails. From the opinion below it appears that the courts are powerless to determine title to a trust fund in the Treasury even though the United States makes no claim to the fund—either as owner or trustee. Such a decision, if allowed to stand, results in the unjust enrichment of the custodian (the United States) at the expense of the contributors to the trust who had every right to assume that the Treasury was acting merely as a banker or stakeholder.

Petitioners submit that the statutory language used shows plainly that Congress was disclaiming any proprietary interest in these trust funds. It follows that where the express trust fails the money remains appropriated to be returned to the contributors who are, in effect, the beneficiaries of a resulting trust. This interpretation of the statute is in accord with the legislative history of the Act. House Report No. 1414, 73d Cong., 2d Sess., p. 12 (discussing § 22 of the original bill). See also Appendix B of the Hearing before the Subcommittee of House Committee on Appropriations in charge of Permanent Appropriations,

73d Cong., 2d Sess., p. 961. (In its Report No. 1414, *supra*, p. 2, the House Committee called the attention of Congress to this Appendix.)

The ruling below in denying jurisdiction to the courts conflicts in principle with *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 68 App. D. C. 163, 164, 94 F. 2d 632, which held that where the United States claimed no interest in the fund—

> * * * one who has an equitable right in the fund as against the payee may have relief against the officials of the Treasury through a mandatory writ of injunction or a receivership, so as to bind the payee and afford a proper acquittance to the government. As much as this was said in Houston v. Ormes, 252 U. S. 469, 40 S. Ct. 369, 64 L. Ed. 667.

III

The subject matter of this litigation is not only of importance to some 100,000 cotton producers (R. 995, footnote 3) who paid over $22,000,000 to respondents in trust (R. 985-988), but it is also of importance to many other persons who have or may in the future contribute funds in trust to be deposited in the Treasury pursuant to § 20 of the Permanent Appropriation Repeal Act. Certainly the labyrinth of Government accounting should not be permitted to result in the confiscation of a depositor's money.

IV

The Court should grant certiorari to resolve the holdings below with regard to a litigant's right to a money judgment even though the defendant is without funds with which to pay such a judgment. The Court below originally believed the availability of the trust res to be without significance holding in part that—

> * * * it is settled law that if money is illegally demanded and received by an agent he cannot exonerate himself from *personal* responsibility by paying it over

to his principal *when he has notice not to pay it over.* (App. 30; italics supplied.)

Since over $5,800,000 was in the Treasury of the United States on April 30, 1936 (R. 497, 501-502, 567), several months after the decision in *United States* v. *Butler, supra,* and the filing of this suit, and more than a month after respondents were notified not to distribute these funds (R. 836), and since respondents thereafter distributed these trust funds *on their own motion,*[7] it is believed that petitioners are entitled to a personal judgment against respondents for the amount of these funds which respondents have voluntarily dissipated.

Certainly petitioners' right to a recovery herein should not depend on the availability of a fund from which respondents can repay the money they gave away after the *lis pendens* of this suit. As the Court below has previously said, "* * * a plaintiff may have a judgment notwithstanding the defendant is execution proof". *Inland Waterways Corporation v. Hardee,* 69 App. D. C. 268, 274, 100 F. 2d 678, reversed on other grounds *sub nominee Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 60 S. Ct. 646. To the same effect is this Court's holding in *Sloan Shipyards Corp.* v. *United States Shipping Board,* 258 U. S. 549, 568, 42 S. Ct. 386.

If, however, this Court should determine that such funds were disbursed by respondents as a proper function of their duties, the District Court can undoubtedly issue a certificate of probable cause to respondent Julian pursuant to the Act of March 3, 1863, c. 76, § 12, 12 Stat. 741, 28 U. S. C. A. § 842. Thus, the judiciary can itself overcome the imaginary hurdle of a proper appropriation.

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[7] This money was disbursed despite the fact that the Comptroller-General had refused to rule on the availability of the fund for payment to the original beneficiaries (R. 613-618, 937). Only the Comptroller-General has authority to pass on such questions. Act of July 31, 1894, c. 174, § 8, 28 Stat. 162, 208; Act of June 10, 1921, c. 18, § 304, 42 Stat. 20, 24; 31 U. S. C. A. § 74. 21 Op. Atty. Gen. 178, 25 Op. Atty. Gen. 301, 28 Op. Atty. Gen. 129.

CONCLUSION.

Since members of the class represented by petitioners have been denied a recovery in the Court below and also in the Court of Claims on the ground that the same money was and was not, respectively, under the control of the United States, it is respectfully submitted that this petition should be granted to resolve the differences between the holdings below as to the legal title to the trust fund here involved.

It is also believed that this Court should grant the writ to fix the rights of depositors of trust funds after their money has been placed in the United States Treasury and the express trust has failed.

Respectfully submitted,

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Attorneys for Petitioners.

January, 1945.

APPENDIX.

[Copy of opinion reported at 67 App. D. C. 327, 92 F. 2d 478]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6695

J. WOOD THOMPSON, A. W. FISHER, D. S. HOPSON, AND S. J. WARD SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, APPELLANTS,

v.

ERNEST L. DEAL, INDIVIDUALLY AND AS MANAGER OF THE NATIONAL SURPLUS COTTON TAX EXEMPTION CERTIFICATE POOL, 1935, HENRY A. WALLACE, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES, W. A. JULIAN, INDIVIDUALLY AND AS TREASURER OF THE UNITED STATES, ET AL., APPELLEES.

Appeal from the District Court of the United States for the District of Columbia

(Argued April 5, 1937—Decided June 28, 1937)

John C. White, of Washington, D. C., and *Jerome S. Hafter*, of Greenville, Miss., for appellants.

Robert H. Jackson, Assistant Attorney General, *Leslie C. Garnett*, United States Attorney, and *Sewall Key*, *F. A. LeSourd*, and *F. J. Neuland*, all of Washington, D. C., for appellees.

Before MARTIN, C. J., and ROBB, VAN ORSDEL, GRONER, and STEPHENS, JJ.

GRONER, J.: This is an appeal taken from a decree dismissing a bill in equity brought by appellants to recover amounts paid by them in purchasing exemption certificates issued under the Bankhead Act from the National Surplus Cotton Tax Exemption Certificate Pool. Some of appellants reside in Mississippi, others in Alabama. The suit was brought as a class suit in the United States District Court against Deal, the manager of the National Cotton Pool, a resident of the District of Columbia; Wallace, the Secretary of Agriculture; Julian, the Treasurer of the United State; and Payne and Davis, Comptroller and Administrator, respectively, of A. A. A.